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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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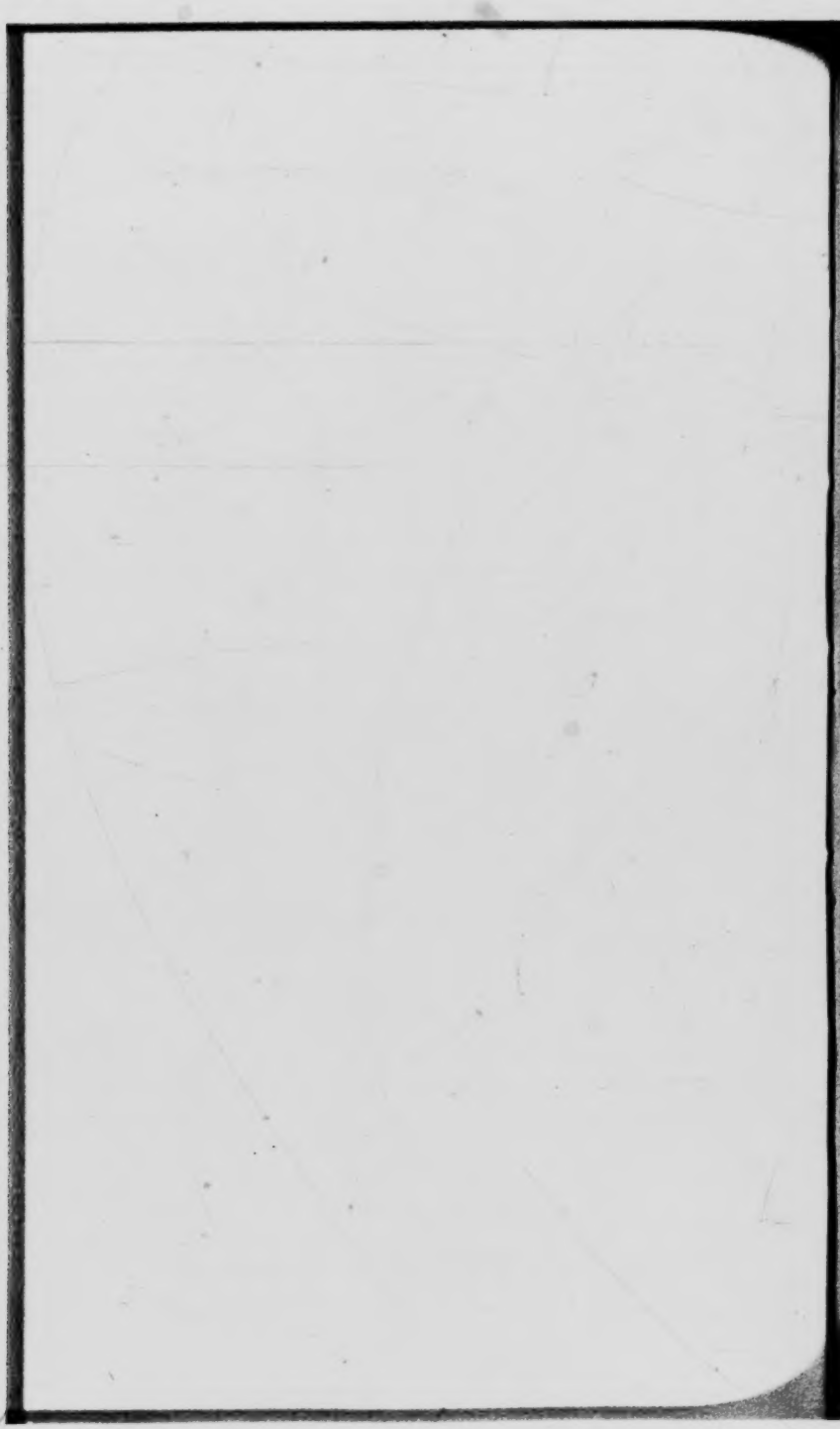

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT	3
I. Agency Proceedings	3
II. The Opinion Below	6
REASONS FOR GRANTING THE WRIT	7
I. The Court of Appeals Has Decided an Important Constitutional Question Which Should Be Resolved by This Court	7
II. The Court of Appeals Decision Is in Direct Conflict With Decisions of the Courts of Appeals for the First and Third Circuits	14
CONCLUSION	16
APPENDIX A	A 1
APPENDIX B	B 1
APPENDIX C	C 1
APPENDIX D	D 1
APPENDIX E	E 1

TABLE OF CASES

Avins v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied* 390 U.S. 920 (1968)	15
Banzhaf v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969)	10
Business Executives' Move for Vietnam Peace, 25 F.C.C. 2d 242 (1970)	4

Page

Green v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971) 13, 15
Larus & Brother Co. v. *FCC*, 447 F.2d 876 (4th Cir. 1971) 10
Massachusetts Universalist Convention v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950) 9, 15
McIntire v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied* 327 U.S. 779 (1946) 9, 14
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 8, 10
Pulitzer Pub. Co. v. *FCC*, 94 F.2d 249 (D.C. Cir. 1937) 15
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 5, 7, 8, 9, 15, 16
United States v. *Guest*, 383 U.S. 745 (1966) 14
West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 10

CONSTITUTIONAL PROVISION AND STATUTES

United States Constitution

First Amendment 6, 7, 8, 9

Communications Act of 1934, as amended

Section 3(h) (47 U.S.C. § 153(h)) 9
Section 326 (47 U.S.C. § 326) 10
Section 402(a) (47 U.S.C. § 402(a)) 6

Judicial Code

Section 1254(1) (28 U.S.C. § 1254(1)) 2

MISCELLANEOUS

Editorializing Report, 13 F.C.C. 1246 (1949) 8

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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American Broadcasting Companies, Inc. (hereinafter "ABC"), hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of August 3, 1971, in *Business Executives' Move for Vietnam Peace* v. *FCC*, No. 24,492, and *Democratic National Committee* v. *FCC*, No. 24,537, two separate cases decided in a single opinion. ABC intervened in support of the Federal Communications Commission and United States of America in the *Democratic National Committee* case, and participated as a party before the Commission and the Court of Appeals.

The United States, the Federal Communications Commission, Post-Newsweek Stations, Capital Area, Inc. (Intervenor in No. 24,492) and Columbia Broadcasting System, Inc. (Intervenor in No. 24,537) are also petitioning for certiorari to review the Court of Appeals decision.

FCC v. *Business Executives' Move for Vietnam Peace*, filed January 3, 1972; *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives' Move for Vietnam Peace*, filed January 3, 1972; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, filed January 3, 1972.

OPINION BELOW

The Court of Appeals' opinion, attached hereto as Appendix A, has not yet been officially reported. The decision of the Federal Communications Commission, attached hereto as Appendix D, is reported at 25 F.C.C.2d 216 (1970).

JURISDICTION

The judgment of the Court of Appeals, attached hereto as Appendix B, was entered on August 3, 1971. Timely petitions for rehearing were denied by an order of the Court of Appeals, attached hereto as Appendix C, entered October 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the First Amendment to the Constitution requires the Federal Communications Commission to establish a regulatory system under which broadcast licensees, presently required to provide full and fair coverage of diverse viewpoints on controversial public issues, must also permit the purchase by individuals or groups of "spot" announcements to present the views of those individuals or groups on such issues.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution, and Sections 3(h), 315 and 326 of

the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 315 and 326. These constitutional and statutory provisions are set forth in Appendix E to this petition.

STATEMENT

I. *Agency Proceedings.* Petitioner American Broadcasting Companies, Inc., itself or through its subsidiaries, is the licensee of a number of radio and television stations and operates radio and television networks.

This case originates with a request by the Democratic National Committee (hereinafter "DNC") that the Federal Communications Commission (hereinafter "FCC" or "Commission") issue a declaratory ruling that, as a general matter, broadcast licensees are required to sell broadcast time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." (App. D, D1.)[1] Framed in this fashion, the DNC petition contained no assertions that any particular broadcast licensee either had failed to provide full and fair coverage of important public issues or had refused to sell time for comment on controversial public issues. Indeed, the request contemplated that notwithstanding such coverage or any individual offers of paid time for controversial issue comment, a general obligation remained as to all broadcasters to sell time to DNC and similar groups to present their viewpoints.[2]

Since the declaratory ruling request made reference to their operational policies, the Commission solicited comment on the proposal from the three national television networks. In response, ABC set forth a number of in-

[1] Citations to appendices to this petition will appear "App. —, —".

[2] The DNC had explained that its request was largely prompted by the need of political parties, particularly its own, to achieve a broader financial base—an accomplishment that could be more readily assured by guaranteed access to the broadcast media for fund raising announcements. (App. D, D2-D3).

ternal policy standards which, *inter alia*, recognize an abiding responsibility to utilize its broadcast facilities in a manner which safeguards and promotes opportunity for the full exposure of representative views on controversial issues of general concern to the American people. At the same time, recognizing the public interest detriments of, and practical impediments to, a universal and absolute right by any "responsible entity" to purchase time to espouse a point of view or to solicit funds, ABC advised the Commission that it proposed to continue a general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations. However, ABC further indicated that it was prepared to accept such orders for time from major political parties as could reasonably be accommodated. (App. D, D5.)

In its decision, the Commission held that broadcasters must make time available "to significant political parties for the solicitation of funds," but that—relevant to the ensuing judicial review—important statutory and policy considerations militated against granting DNC or any other particular individual or group an absolute right of access to broadcast time for the purpose of commenting on controversial issues of public importance.[3]

The Commission emphasized that although there are no policy restraints that would preclude a licensee—consistent with his fairness doctrine responsibilities—from selling time for controversial issue discussion, more compelling considerations motivated the Commission's refusal to hold that a licensee is unyieldingly bound to sell time for the presentation of particular persons or groups. A guiding theme underlying this holding was the Commis-

[3] In a separate action announced on the same day, the Commission similarly rejected the complaint of an anti-war group against a Washington radio station which had refused to sell spot advertising time to present that group's views on the Vietnam War. *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).

sion's finding that the regulatory framework sanctioned by Congress in the Communications Act of 1934, as amended, deliberately avoided placing broadcasting in a "common carrier" mold. (App. D, D14.) Thus, in contrast to common carriage, which is public in its availability but essentially private and passive in its communication function, broadcasting exists to communicate to the public at large.

As the Commission observed, this was the very role endorsed by this Court in its *Red Lion* decision [4]—a role which contemplates that broadcast licensees will perform in a "fiduciary" capacity for the entire public they serve. In this context, the Commission noted that in *Red Lion*, this Court had characterized the broadcaster's task as being oriented to the presentation of "representative community views on controversial issues." This undertaking does not, however, comprehend the further dimension embodied in DNC petition, that there is an obligation to sell time for the presentation of individual views over and beyond the fairness doctrine right of the public to be informed. (App. D, D16.) As the Commission remarked, a determination of this sort would entail a substantial reordering of the fairness doctrine and a direct assault upon the touchstone of broadcast regulation—i.e., the concept set in motion by Congress, and more recently sustained by this Court in *Red Lion*, that the public interest obligation of broadcasters is to devote a reasonable amount of time to issues of public importance and to do so in a fair manner. On this basis, the Commission ultimately concluded that the present system of regarding licensees as "trustees", with an affirmative duty to present contrasting viewpoints through representative spokesmen, was of greater public benefit than—and could not reasonably coexist with—a regulatory standard based on an individualized right of access. (App. D, D22.)

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[4] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

II. *The Opinion Below.* Upon petitions for review under Section 402(a) of the Commuincations Act of 1934, 66 Stat. 718, as amended, 47 U.S.C. § 402(a), the United States Court of Appeals for the District of Columbia Circuit, in a consolidated opinion comprehending the *Business Executives* case as well,[5] reversed the separate decisions of the Commission. The lower court, by a two-to-one vote, held that broadcast licensees who sell time for spot advertisements for commercial products and services are obligated by the First Amendment to make such advertising time available to individuals and groups wishing to present their particular views on controversial issue subject matter. Under the majority opinion, the newly articulated constitutional right to purchase spot announcements for public issue discussion would obtain regardless of whether the licensee in question was in full compliance with the Commission's fairness doctrine. Indeed, the right could be invoked even in circumstances where the issue and precise viewpoint the individual or organization seeks to address has been specifically covered in prior broadcasts. (App. A, A25.)

The court was unpersuaded by the contentions of the Commission and broadcasters that the public's agenda for public issue discussion would increasingly be determined by those persons or groups having the financial wherewithal to purchase media access; that, in the process, licensees would face diminished control over their program content and schedules; and that the associated fairness doctrine principle that contrasting views be presented free of charge if sponsorship is unavailable could, if applied to this form of editorial announcement, impair the broadcast industry's financial base. In this regard, the court below simply remanded the cases to the Commission for the purpose of developing "reasonable regulatory guidelines" to somehow accommodate these and other factors. (App. A, A40-A41.)

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[5] See note 3, *supra*.

Judge McGowan, in dissent, characterized the Commission's task as one of "heroic proportions," the complexity of which might undermine the basic premise on which it was founded. He was further unconvinced that the Constitution required that such a task be undertaken. (App. A, A42.) In Judge McGowan's view, the newly established First Amendment right announced by the court could interfere with and frustrate the right—so essential to this Court's prior ruling in *Red Lion*—of the public to be fully informed. The private licensee system of broadcasting provided by Congress, operating under "an obligation . . . to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial issues of public importance," has proven to be an effective mechanism for implementing the desired public policy. (App. A, A43.) To now disgard this regulatory scheme for "a new system in which money alone determines what issues are to be aired" would, Judge McGowan concluded, represent an unwise and unnecessary course. (App. A, A43.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided an Important Constitutional Question Which Should Be Resolved by This Court

The decision below establishes a constitutional right relating to the broadcast field heretofore unarticulated and unacknowledged, either by the Congress, by the Federal Communications Commission or by the courts. Reading this Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) to be a "clarion call for a new public concern and activism regarding the broadcast media" (App. A, A11), the majority panel below has ruled that private individuals and groups have a First Amendment entitlement to purchase spot announcements on broadcast stations for the purpose of presenting their views on controversial issues of public importance. While

initially asserting the issue before it to be a "relatively narrow" one (App. A, A4), even the lower court ultimately acknowledged its decision to be a most dramatic and far-reaching one.[6] And indeed, the decision represents at once a misconstruction of this Court's prior decisions dealing with the relationship of broadcasting and the First Amendment, an inconsistency with the Congressional design of the broadcaster-federal government relationship, and a potentially drastic disruption of the regulatory scheme which has vested in the broadcaster the basic responsibility to determine the form and content of discussions of public issues on his station.

This Court has twice made clear that, by reason of its unique nature and unlike other modes of expression, "radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969). And under the statutory structure established by Congress and administered by the FCC, it has been the broadcaster who has been charged with the responsibility of determining what entities will be granted access to his broadcast facilities. Describing the nature of the discretion thus vested in its licensees, the Commission stated in its basic *Editorializing Report* in 1949 (13 F.C.C. 1246, 1251-52):

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . .

[6] See, e.g., App. A, A 14, n. 16, where the court rejected a "highly analytical—one might say mechanical—approach" to the "state action" question, choosing instead "to paint with a broader brush."

Thus it is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter which is the foundation stone of the American system of broadcasting." *Id.* at 1249; see also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Yet notwithstanding this Court's emphatic delineation of the public's collective right of access to *viewpoints* in *Red Lion*, 395 U.S. at 390, the lower court has sought to drastically shift the focus of that declaration by according individuals and groups a constitutional right to spot advertising time on commercial broadcast stations. In so doing, the lower court has ignored the clear import of this Court's observation in *Red Lion* that "it is idle to posit an unabridgeable First Amendment right to broadcast" inhering in private individuals or groups. *Id.* at 388. Moreover, it has interjected a concept and structure which, if pursued, will ultimately undermine the most fundamental policy goal of enhancing the public's ability to share in a full media exposition of social, political and other ideas and experiences. *Id.* at 390.

To the extent that the lower court's ruling significantly impairs a broadcast licensee's ultimate responsibility to determine what programming he may carry, it is also directly contrary to the legislative scheme Congress has established for broadcasting. Section 3(h) of the Communications Act, for example, expressly provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h). See *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied* 327 U.S. 779 (1946). However, the majority holding below—that broadcast licensees must sell or donate time to any and all responsible entities for the presentation of their views on controversial

issues of public importance—would effectively transform broadcast advertising time into at least a part-time "common carrier" function, in express contravention of the language of Section 3(h). Moreover, the lower court's ruling likewise flies in the face of the explicit Congressional prohibition against regulation of program content as set forth in Section 326 of the Communications Act. 47 U.S.C. § 326. For compelling a broadcaster to make time available to any responsible person or entity is as much an encroachment on free expression as the suppression of particular views. See *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641-642 (1943); *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969). As it was said in *Banzhaf* (*id.* at 35):

> We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition.

Review of the lower court's decision is further warranted in light of the substantial impact its implementation will have on the broadcast industry generally, and on the future administration of the Communications Act. As noted above, the American system of broadcasting has been founded on a recognition that the medium inherently cannot accommodate all, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); *Larus & Brother Co.* v. *FCC*, 447 F.2d 876, 882 (4th Cir. 1971), and a determination that broadcasters, rather than government, should perform the function of determining who must be denied. This fundamental regulatory principle has been the essential predicate for the Commission's fairness doctrine which, while requiring treatment of opposing views on controversial issues, permits licensee discretion in the selection of spokesmen and program format. Under the terms of the lower court's decision, however, that discretion is significantly diminished; broadcasters can appar-

ently no longer decide to exclusively meet their "fairness" obligations by public affairs and news programming, even though this may seem to be the more informative course. Presumably, they could treat certain controversial issues exclusively in a series of spot announcements (some paid, some free) regardless of the informative value.

The likely practical effects of the majority opinion, therefore, include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of "editorial advertising," the resultant heavier involvement of the Commission in disputes over who is to have access, and the transformation of public affairs programming from an innovative, self-initiating posture to something more and more restricted as it is increasingly employed as a responsive device for spot announcements.

The majority opinion below discounted the seriousness of these consequences by asserting that it had created only a "limited" right—one which can be further circumscribed by "reasonable regulations." However, as recognized in Judge McGowan's dissent, the practical detriments to the overall public interest are not so easily avoided.

Two principal characteristics typify network and station advertising time—it is limited (especially in "prime time" when heavy demand accentuates the inherent time restriction) and it is expensive. Under the system established by the majority opinion below, a premium is automatically placed on wealth in at least initially using broadcast facilities to disseminate controversial issue advertisements. Consequently, undue encouragement is given to the exposure in this format of either (1) the *side* of a controversial issue espoused by those of greatest wealth or (2) the limited *issues* which only attract well financed competing groups. This not only produces an unwarranted discrimination against particular viewpoints and particular issues, but represents a direct impediment to the collective right of the public to receive access to

a broad range of social, political and other ideas and experiences.

A less tangible but equally pertinent impact of the system imposed by the majority decision below is that a degree of broadcaster independence in the news and public affairs area is necessarily diminished by the need to orient such programming to be responsive to the paid controversial issue announcements broadcast throughout the day, week or month. In the normal course, news and public affairs programming is designed to be responsive to the fluctuating needs and interests of the public as a whole. To a significant extent, therefore, public events and problems determine program relevance. However, the changes set in motion by the majority opinion below are potentially disruptive of this traditional journalistic process. For in many cases broadcasters will be forced to consider factors other than news value as a motivation for public affairs programming—placing increasing emphasis in content selection on matters which, irrespective of news value, may be the subject of extended treatment in spot announcements prepared by controversial issue advertisers.

An even greater threat to broadcasters' journalistic independence is the resultant intrusion of the FCC into day-to-day station and network operations. There can be no doubt that, from the initial setting of "reasonable regulatory guidelines" to implement the lower court's directive (App. A, A40), the Commission would increasingly be called upon to rule on such matters as (1) what issues are to be covered; (2) what viewpoints on given issues require more or less attention; and (3) what persons or groups are to be allowed to express their views. In short, disputes over the exercise of the newly articulated right will be inevitable and prolific, thrusting the Commission—and likely the courts as well—further and more profoundly into the area of program content judgments.

These considerations are made all the more difficult when it is recognized that the right created by the decision below is apparently one that exists separate and apart from normal application of the fairness doctrine. (*E.g.*, App. A, A26.) Thus, even though a station or a network may have provided full and fair coverage of a controversial issue in its overall programming, the right to purchase spot advertisements would remain undisturbed —possibly effecting an imbalance in such coverage calling for further responsive programming.[7]

These conditions, we submit, represent the very antithesis of the "uninhibited, robust, and wide-open" debate on public issues which the Congress, the courts and the Commission have sought to achieve through such policy prescriptions as the fairness doctrine. The newly imposed right will complicate rather than enhance public debate, encourage the disproportionate expression of views by interests reflecting the most wealth, and necessarily invite an enlarged role of government supervision over the choice of issues and spokesmen. In the process, by government intrusion and the force of implementation, broadcasters will be confronted with mounting inflexibility in carrying out their programming and journalistic roles.

As such, the decision below has far-reaching consequences for both the manner in which broadcasting is conducted on a day-to-day basis and the degree to which the federal administrative apparatus charged with the overall regulation of broadcasting will be called upon to

[7] Confusion also exists as to whether, pursuant to the system imposed by the lower court, a broadcaster could present a contrasting and follow-up viewpoint in other than a spot announcement context if the "opening" viewpoint had been expressed in this manner, particularly if the counter spokesman asserts his "right" to a presentation of his views in an advertising format. This aspect of the ruling also appears inconsistent with the decision of a different panel of the Court of Appeals below in *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), wherein the court observed that "not every advertisement carrying a controversial message . . . calls for response through a similar spot announcement format." 447 F.2d at 332.

respond. The broad potential impact upon broadcasting and the regulatory process under which it operates, furnish independent and ample reason why certiorari should be granted.

II. The Court of Appeals Decision Is in Direct Conflict With Decisions of the Courts of Appeals for the First and Third Circuits

In determining that the First Amendment establishes a right of access to broadcast facilities, the court's decision below is squarely in conflict with prior decisions of the First and the Third Circuits on the matter.

While cognizant of the well-established principle that the First Amendment applies to governmental and not to private actions,[8] the court below found that the interrelationship between the FCC and its licensees is such that broadcast station operation effectively represents "state action" to which First Amendment protections extend. (App. A, A11-A18.) That basic finding, however—essential to the Court's ultimate holding—as well as the consequent entitlements it implies, were specifically eschewed in *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied* 327 U.S. 779 (1946). In rejecting a religious organization's claim that it had a statutory and First Amendment right to purchase time on a station for the broadcast of its programs, the Third Circuit expressly pointed out that the broadcaster "is not an instrumentality of the federal government" for constitutional purposes. *Id.* at 601. Rather, the court recognized that under the regulatory scheme established by the Communications Act, a significant separation between the broadcaster and the state is evident in Congress' having "confided the selection of program material to be broadcast to the taste and discrimination of the broadcasters." *Id.* at 600. The Court

[8] See, e.g., *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

further emphasized that while broadcasters might be considered "public trustees," a radio station is clearly not a public utility "in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.* at 600-01.[9] Similarly, in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the District Court's view that broadcast licensees' conduct did not constitute "state action" as to which the First Amendment right of access asserted and upheld below would apply.[10]

Significantly, the majority opinion below specifically acknowledged the inconsistency of its decision with the two cases cited, but dismissed those decisions as representing a "crabbed judicial view of 'state action'." (App. A, A11.) The court further found the *Red Lion* decision —read to be "a clarion call for a new public concern and activism regarding the broadcast media"—to clear the path of such "doctrinal impedimenta." (App. A, A11.) However, *Red Lion* concerned itself with the lawfulness of particular administrative controls on broadcasters claimed to be statutorily authorized, and the Court in no sense addressed itself to the matter of "state action."

In fact, and as reflected in the *McIntire* and the *Massachusetts Universalist Convention* decisions, the statutory structure established by Congress for the regulation of broadcasting is one in which the primary responsibility for broadcast material is vested not in the Federal Government, but in private entities operating as free from direct interference by the Commission as possible. Judge

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[9] Cf. *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937). Compare *Green* v. *FCC*, *supra* note 7, in which a different panel of the court stated that under the fairness doctrine, "no individual member of the public has the right of access to the air; the licensees may experience their judgment as to what material is presented and by whom . . ." 447 F.2d at 328.

[10] See also *Avins* v. *Rutgers*, 385 F. 2d 151, 153 (3d Cir. 1967), *cert. denied* 390 U.S. 920 (1968).

McGowan correctly observed in his dissent (App. A, A43):

> This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice . . . .

And as the First and Third Circuits have recognized, the relationship long ago established between broadcasting and the Federal Government is not consistent with the lower court's determination that private licensee decisions constitute "state action." Before that view is abandoned or reversed, and lest the *Red Lion* decision be read, as the lower court interpreted it, to be a "clarion call" for "new public . . . activism" requiring the type of judicial invention evidenced in this case, review by this Court is required.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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